2009

State of Utah v. Leonard Stewart : Unknown

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee vs. LEONARD STEWART, Defendant/Appellant	Case No. 20090572-CA

APPELLANT'S SUPPLEMENTAL MEMORANDA

APPEAL FROM THE FOURTH DISTRICT JUDICIAL COURT, STATE OF UTAH, FROM THE JUDGMENT AND SENTENCE OF THE HONORABLE GARY D. STOTT FOLLOWING A BENCH TRIAL CONVICTION FOR RETAIL THEFT WITH PRIOR CONVICTIONS, A THIRD DEGREE FELONY

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MEMORANDA

I. APPLICABILITY AND IMPACT OF RULES 1001 AND 1005 OF THE UTAH RULES OF EVIDENCE ON THE ISSUE OF WHETHER A SIGNED JUDGMENT IS NECESSARY TO PROVE A PRIOR CONVICTION.

Rules 1001 (Definitions) and 1005 (Public Records) of the Utah Rules of Evidence set forth basic principles surrounding the "best evidence" rule.[1] These rules, generally classified as Article X of the Utah Rules of Evidence, address the reliability and therefore admissibility of certain documents as evidence. Presently, the State introduced an unsigned copy of a prior conviction as evidence for that prior conviction. Beyond those issues presented in his briefs, Stewart contends that Article X, specifically, Rule 1005 prevents the State from introducing unsigned documents as evidence of a prior conviction.

[1] Rules 1001 and 1005 of the Utah Rules of Evidence are identical adaptations of corresponding Federal Rules. See, Utah R. Evid. 1005 Advisory Committee Notes.

a. For Authentication under Rule 1005, the Document Must Either be Signed under Seal or an Authorized Custodian to Represent that the Document is Genuine

Rule 1005 of the Utah Rules of Evidence addresses foundational issues, primarily reliability, of public records. Rule 1005 of the Utah Rule of Evidence mirrors that of the Federal Rule. See, Utah R. Evid. 1005 Advisory Committee Notes. Committee Notes on the Federal Rule indicate that this public records exception to the general rule that the original be admitted creates a *quid pro quo* scenario. See, Fed. R. Evid. 1005 Advisory Committee Notes; see also, Mangrum & Benson on Utah Evidence, Vol. 1, pp. 725-26 (2008-09 ed.). The purpose of this exception allowing certified copies substantially comports with issues of reliability while avoiding the burden involving obtaining original public records. See, 4 Handbook of Federal Evidence, § 1005:1 (6th ed. 2010).

To qualify under Rule 1005, the document proffered must be either: (1) a properly certified copy that complies with Rule 902; (2) or a copy that is certified through a witness that the copy is true to the original; or (3) if a copy is unattainable, then other evidence may be admitted, it does not create any exception as to proof of priors. Utah R. Evid. 1005. While Rule 1005 creates an exception as to the "best evidence" rule (meaning an exception to the admission of the original document), the document must also be otherwise admissible.

Here, the State attempted to introduce an unsigned and therefore uncertified copy of a prior conviction as evidence for a prior conviction. As noted, the State is allowed (3) three methods to introduce evidence of a prior conviction (a public record). A witness

was not presented nor was the document unobtainable through reasonable diligence; therefore, to be admissible, the State was required to comply with Rule 902(4).

Rule 902(4) states that a copy of a document is self-authenticating if that document is (1) authorized to be recorded by law in a public office; and is (2) certified as correct by the custodian or other authorized person to make the certification that complies with 902(1), (2) or (3). Utah R. Evid. 902. Here, only sections (1) or (2) apply.

Section (1) addresses domestic public documents under seal. Such a document must bear the State seal *and* a signature purporting to be an attestation or execution. Utah R. Evid. 902(1). Subsection (2) addresses domestic public documents not under seal. This requires that a person with authority and seal attests that the document not under seal bears a genuine signature. These conditions support this Court's reasoning behind its ruling in State v. Anderson. See, State v. Anderson 797 P.2d 1114, 1115-116 (Utah Ct. App. 1990) (finding four (4) reasons that judgments, to be valid, must be signed).

Here, the State comported with neither of these provisions regarding authentication/reliability.

b. Compliance with Rule 1005 and 902 of the Utah Rules of Evidence Do Not Obviate the State's Requirement to Comply with Other Constitutional Concerns

Although Rules 1005 and 902 of the Utah Rules of Evidence provide a more convenient method to introduce copies of documents, these rules, however, do not circumvent nor obviate the constitutional rights afforded criminal defendants. For example, the State's compliance with Rule 1005 does not supersede the defendant's right to counsel as to prior convictions.

In State v. Von Ferguson, 2007 UT 1, 169 P.3d 423, the Utah Supreme Court addressed the issue of whether a defendants prior uncounseled conviction could be used as proof of enhancement on a subsequent offense. In Von Ferguson, the defendant challenged the penalty enhancement based on proof of prior convictions. Specifically, the defendant objected at preliminary hearing to the introduction of a certified copy of a previous conviction for violating a protective order because the conviction was *prima facie* evidence that he had not been represented by counsel nor had he waived that right. Id. at ¶¶ 3-8.

On appeal, the Supreme Court perused the litany of cases in its analysis that addresses a defendant's constitutional right to counsel under the Sixth Amendment. Von Ferguson, 2007 UT 1, ¶¶ 14-27. In conclusion, the Court held that "the Sixth Amendment attached to Ferguson's prior conviction when he received a one-year suspended sentence. He consequently had the right to be represented by counsel. Because he was not, Ferguson's conviction is invalid and cannot be used to enhance the subsequent criminal charge unless he waived his right to counsel." Id. at ¶ 27.

Similarly, Stewart contends that even if rules 1001 and 1005 are complied with, the State cannot overcome a defendant's constitutional right per the Sixth Amendment. While Stewart acknowledges that the issue of right to counsel is not central to the issues in this case, Stewart urges that this Court continue to follow the standard set forth in Von Ferguson.

Rule 1005 of the Utah Rules of Evidence addresses foundational issues, primarily reliability, of public records. Rule 1005 of the Utah Rule of Evidence mirrors that of the

Federal Rule. See, Utah R. Evid. 1005 Advisory Committee Notes. Committee Notes on the Federal Rule indicate that this public records exception to the general rule that the original be admitted, creates a *quid pro quo* scenario. See, Fed. R. Evid. 1005 Advisory Committee Notes; see also, Mangrum & Benson on Utah Evidence, Vol. 1, pp. 725-26 (2008-09 ed.). The purpose of this exception allowing certified copies substantially comports with issues of reliability while avoiding the burden involving obtaining original public records. See, 4 Handbook of Federal Evidence, § 1005:1 (6th ed. 2010).

To qualify under Rule 1005, the document proffered must be either: (1) a properly certified copy that complies with Rule 902; (2) or a copy that is certified through a witness that the copy is true to the original; or (3) if a copy is unattainable, then other evidence may be admitted, it does not create any exception as to proof of priors. Utah R. Evid. 1005. While Rule 1005 creates an exception as to the "best evidence" rule (meaning an exception to the admission of the original document), the document must also be otherwise admissible.

For example, in United States v. Ruffin, 575 F.2d 346 (2nd Cir., 1978), the Court addressed the admissibility of evidence that comported with rule 1005 of the Federal Rules of Evidence. At trial, the defendant objected to the admission of an IRS computer printout as irrelevant – although on appeal he urged it should not have been admissible based on hearsay. Id. at 355. The Court ultimately concluded that the document was inadmissible, and held:

> The government's reliance on Fed.R.Evid. 1005 is misplaced inasmuch as that rule does not purport to guarantee the admissibility of the contents of public records but only insures that those contents may under the conditions specified in Fed.R.Evid. 1005 be introduced by way of copy rather than production of the original but only if (the contents of the original record are) otherwise admissible.

Ruffin, 575 F.2d 346, 356 (2nd Cir. 1978) (internal quotations omitted).

While the State has been provided with a convenient means of presenting evidence by way of a certified copy, that document itself may either present issues that would otherwise exclude the evidence. E.g., Ruffin, 575 F.2d 346, 356 (holding that the evidence, while compliant with rule 1005, did not comply with issues of hearsay).

Another example of how compliance with rules 1005 and 902 provide a convenience and not an exception to otherwise inadmissible evidence, is with regards to a defendant's right to confrontation.

Over the past decade, the United States Supreme Court has addressed and attempted to expound more clearly on the complex issues surrounding hearsay and a defendant's right to confront witnesses. Initially, the Court was concerned with hearsay not confrontation as evidenced in Ohio v. Roberts, 448 U.S. 56, 66, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980). Id. at 66 (holding that evidence with "particularized guarantees of trustworthiness" was admissible without confrontation).

Later, however, in Crawford v. Washington, 41 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), the Court modified its stance and indicated that although a statement may have indicia of reliability it may still not comport with the Confrontation Clause. In Crawford, the Court found that a wife's statement to a police officer investigating her

husband's conduct was not admissible – although it may have been reliable. Crawford, 41 U.S., at 65-69. The Court made its ruling, in part, on what is considered "testimonial"[2]

Most recently, the Court issued its opinion in Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009). Melendez-Diaz addressed whether a lab technician's sworn certificate of analysis was a testimonial statement requiring confrontation at trial when the analyst was available for trial and the defendant had not prior opportunity for cross-examination. Id. Again, although the certificate may have comported with the rules of evidence regarding hearsay, the fact remained that the statement was "testimonial." Quoting Crawford, this Court affirmed that a statement, which can be proffered through a document, is "testimonial" if it is a "'solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" Melendez-Diaz, 129 S.Ct. 2527, 2532. Essentially, these certified copies are "are functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination.'" Id. (quoting Davis v. Washington, 547 U.S. 813, 830, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006)).

Similarly here, compliance with rules 1005 and 902 of the Utah Rules of Evidence merely addresses the authenticity of the document. The State's introduction of an unsigned judgment did not comport with Anderson nor the authentication principles set forth in rules 1005 and 902. Even if the State had complied, such compliance does not

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[2] The Court, however, failed to provide a comprehensive definition of "testimonial". Crawford, 41 U.S., at 68.

absolve the State from assuring that the document comports with other constitutional requirements.

CONCLUSION AND PRECISE RELIEF SOUGHT

Consequently, Stewart requests that this Court reverse his conviction for third-degree felony theft and enter his conviction as a class B misdemeanor based on the value established at trial (less than $300).

RESPECTFULLY SUBMITTED this 22 day of February, 2011.

Michael S. Brown

CERTIFICATE OF MAILING

I hereby certify that I delivered two true and correct copies of the foregoing Memoranda of Appellant to the Appeals Division, Utah Attorney General, 160 East 300 South, Sixth Floor, P.O. Box 140854, Salt Lake City, UT 84114, this 22 day of February, 2011.

ADDENDA

C

West's Utah Code Annotated Currentness
State Court Rules
Utah Rules of Evidence (Refs & Annos)
Article IX. Authentication and Identification
RULE 902. SELF-AUTHENTICATION

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) Domestic public documents under seal. A document bearing a seal purporting to be that of the United States, or of any state, district, commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(2) Domestic public documents not under seal. A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in Paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(3) Foreign public documents. A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

(4) Certified copies of public records. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with Paragraph (1), (2), or (3) of this rule or complying with any law of the United States or of this state.

(5) Official publications. Books, pamphlets, or other publications purporting to be issued by public authority.

(6) Newspapers and periodicals. Printed materials purporting to be newspapers or periodicals.

(7) Trade inscriptions and the like. Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

(8) Acknowledged documents. Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

(9) Commercial paper and related documents. Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.

(10) Methods provided by statute or rule. Any method of authentication or identification provided by court rule, statute, or as provided in the constitution of this state.

(11) Certified domestic records of regularly conducted activity. The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by an affidavit or a written declaration of its custodian or other qualified person, certifying that:

(A) the record was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

(B) the record was kept in the course of the regularly conducted activity;

(C) the record was made by the regularly conducted activity as a regular practice; and

(D) the person certifying the records does so under penalty of making a false statement in an official proceeding.

The affidavit or declaration must be signed in a manner that, if falsely made, would subject the maker to criminal penalty under the laws where the declaration is signed. A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and certification available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

(12) Certified foreign records of regularly conducted activity. In a civil case, the original or a duplicate of a foreign record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by an affidavit or a written declaration by its custodian or other qualified person certifying that:

(A) the record was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

(B) the record was kept in the course of the regularly conducted activity;

(C) the record was made by the regularly conducted activity as a regular practice; and

(D) the person certifying the records does so under penalty of making a false statement in an official proceeding.

The affidavit or declaration must be signed in a manner that, if falsely made, would subject the maker to criminal penalty under the laws where the declaration is signed. A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

CREDIT(S)

[Amended effective October 1, 1992; November 1, 2001.]

Current with amendments effective November 1, 2010.

END OF DOCUMENT

C

West's Utah Code Annotated Currentness
State Court Rules
Utah Rules of Evidence (Refs & Annos)
Article X. Contents of Writings, Recordings, and Photographs
RULE 1001. DEFINITIONS

For purposes of this article the following definitions are applicable:

(1) Writings and recordings. "Writings" and "recordings" consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

(2) Photographs. "Photographs" include still photographs, X-ray films, video tapes, and motion pictures.

(3) Original. An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original."

(4) Duplicate. A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduce the original.

ADVISORY COMMITTEE NOTE

This rule is the federal rule, verbatim. The definition of "writing" in subdivision (1) corresponds in substance with Rule 1(12), Utah Rules of Evidence (1971).

LIBRARY REFERENCES

Criminal Law 398 to 403.
Evidence 157 to 187.
Westlaw Key Number Searches: 110k398 to 110k403; 157k157 to 157k187.
C.J.S. Criminal Law §§ 833 to 845.
C.J.S. Evidence §§ 1054 to 1131.

RESEARCH REFERENCES

Treatises and Practice Aids

Wharton's Criminal Evidence § 15:2, Writings and Recordings.

Wharton's Criminal Evidence § 15:3, Photographs.

Wharton's Criminal Evidence § 15:5, Originals and Duplicates.

Wharton's Criminal Evidence § 126:44, Utah.

Rules of Evid., Rule 1001, UT R REV Rule 1001

Current with amendments effective November 1, 2010.

END OF DOCUMENT

C

West's Utah Code Annotated Currentness
State Court Rules
Utah Rules of Evidence (Refs & Annos)
Article X Contents of Writings, Recordings, and Photographs
RULE 1005. PUBLIC RECORDS

The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with Rule 902 or testified to be correct by a witness who has compared it with the original If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given

ADVISORY COMMITTEE NOTE

This rule is the federal rule, verbatim, and comports with the substance of Rule 68, Utah Rules of Evidence (1971)

CROSS REFERENCES

Official records, proof, see Rules Civ Proc , Rule 44

LIBRARY REFERENCES

Criminal Law 398 to 403, 429
Evidence 157 to 187, 325
Westlaw Key Number Searches 110k398 to 110k403, 110k429, 157k157 to 157k187, 157k325
C J S Criminal Law §§ 833 to 845, 1025
C J S Evidence §§ 813, 834 to 838, 840, 923, 1054 to 1131

RESEARCH REFERENCES

Treatises and Practice Aids

Wharton's Criminal Evidence § 15 11, Public Records

Wharton's Criminal Evidence § 130 43, Utah

Rules of Evid , Rule 1005, UT R REV Rule 1005

Current with amendments effective November 1, 2010.

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